

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOSEPH GEORGE,

Plaintiff,

v.

W. SULLIVAN, et al.,

Defendants.

No. 1:20-cv-00659-NONE-SKO (PC)

ORDER ADOPTING FINDINGS AND
RECOMMENDATIONS TO DENY MOTION
TO PROCEED IN FORMA PAUPERIS AND
ALLOWING PLAINTIFF THIRTY DAYS TO
PAY THE FILING FEE

(Doc. Nos. 2, 10)

THIRTY DAY DEADLINE

Plaintiff Joseph George is a state prisoner proceeding *pro se* in this civil rights action brought pursuant to 42 U.S.C. § 1983. This matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On May 15, 2020, the assigned magistrate judge filed findings and recommendations, recommending that plaintiff's motion to proceed *in forma pauperis* (Doc. No. 2) be denied, and this action be dismissed without prejudice, because plaintiff has incurred more than three dismissals counting as "strikes" under 28 U.S.C. § 1915(g). (Doc. No. 10.) The magistrate judge further found that plaintiff's allegations failed to satisfy the imminent danger exception to the three-strikes provision. (*Id.* at 2.) Plaintiff was provided fourteen (14) days to file objections to the findings and recommendations. (*Id.* at 2–3.)

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1 Plaintiff filed timely objections on May 29, 2020. (Doc. No. 12.) In his objections,
2 plaintiff contends that the three-strikes provision of the *in forma pauperis* statute is
3 unconstitutional. (*Id.* at 2.) Plaintiff also argues that the magistrate judge incorrectly found four
4 of his prior cases to be strikes. (*Id.* at 2–3.) Lastly, plaintiff contends that he qualifies under the
5 imminent-danger exception. (*Id.* at 2–4.)

6 In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C), this court has conducted a
7 *de novo* review of this case. Having carefully reviewed the entire file, including plaintiff's
8 objections, the court finds the findings and recommendations to be supported by the record and
9 proper analysis insofar as the magistrate judge has recommended denial of the motion to proceed
10 *in forma pauperis*.

11 First, petitioner cites no caselaw to support his assertion that the three strikes provision is
12 unconstitutional. To the contrary, the Ninth Circuit has held that the provision does not violate a
13 plaintiff's equal protection rights. *Rodriguez v. Cook*, 169 F.3d 1176, 1178–81 (9th Cir. 1999).

14 Second, the magistrate judge correctly found that four of plaintiff's prior cases were
15 dismissed as frivolous or malicious or for failure to state a claim on which relief can be granted.
16 (Doc. No. 10 at 2.) *George v. Schultz, et al.*, No. 4:05-cv-01070-CW (N.D. Cal. Nov. 9, 2005), is
17 properly considered a strike because that court dismissed one of plaintiff's two claims for failure
18 to state a claim and the other because it was clear on the face of his complaint that plaintiff failed
19 to exhaust administrative remedies with respect to the second claim. *See El-Shaddai v. Zamora*,
20 833 F.3d 1036, 1043–44 (9th Cir. 2016) (indicating that where a case is dismissed because failure
21 to exhaust is clear on the face of the complaint, such a dismissal counts as a strike for failure to
22 state a claim). In *George v. Doe*, No. 4:07-cv-03697-CW (N.D. Cal. Aug. 1, 2007), the court
23 dismissed the case as duplicative and abusive under 28 U.S.C. § 1915A. The court's citation to
24 28 U.S.C. § 1915A reflects that the dismissal was based upon a finding that the complaint was
25 frivolous, malicious, or failed to state a claim. That court also cited *Bailey v. Johnson*, 846 F.2d
26 1019, 1020 (5th Cir. 1988), which acknowledged that courts may dismiss duplicative cases as
27 frivolous or malicious. *See also Cato v. United States*, 70 F.3d 1103, 1105 n.2 (9th Cir. 1995)
28 (citing *Bailey* with approval). In *George v. United States, et al.*, No. 3:19-cv-01544-AJB-BLM

1 (S.D. Cal. Oct. 7, 2019), and *Joseph George v. USA*, No. 19-56449¹ (9th Cir. Feb. 6, 2020), the
 2 district court and the Ninth Circuit Court of Appeals explicitly dismissed plaintiff's case and
 3 subsequent appeal, respectively, as frivolous. Both count as strikes. *See Coleman v. Tollefson*,
 4 575 U.S. 532, ___, 135 S.Ct. 1759, 1764 (2015) ("[w]e have found nothing in [the *in forma*
 5 *pauperis* statute] indicating that Congress considered a trial court dismissal and an appellate court
 6 decision as if they were a single entity").

7 Finally, the court agrees with the magistrate judge's finding that plaintiff's allegations fail
 8 to satisfy the imminent danger exception under 28 U.S.C. § 1915(g). (Doc. No. 10 at 2.) In his
 9 objections, plaintiff points to attacks he experienced in April and May of 2018 and January and
 10 May of 2019, at more than one institution of confinement. (Doc. No. 12 at 3-4.) However, the
 11 record indicates plaintiff was transferred to Pelican Bay State Prison (Pelican Bay) at some point
 12 in early 2020. (Compare Doc. No. 1 at 13 (grievance appeal decision dated January 7, 2020
 13 mailed to plaintiff at CCI Tehachapi) with id. at 16 (grievance appeal decision dated March 24,
 14 2020 mailed to plaintiff at Pelican Bay); *see also id.* at 7 (plaintiff alleging appeals coordinator at
 15 CCI Tehachapi retaliated against plaintiff by arbitrarily stopping exhaustion of his grievance
 16 concerning issues at CCI Tehachapi because plaintiff had been transferred). Plaintiff filed this
 17 action, which concerns alleged conduct at CCI Tehachapi, after his transfer to Pelican Bay. (See
 18 Doc. No. 1 at 1.) None of plaintiff's allegations of imminent harm relate to Pelican Bay State
 19 Prison, and plaintiff does not otherwise suggest he was in imminent danger at the time he filed
 20 this action or even that he presently faces imminent danger at Pelican Bay where he is currently
 21 imprisoned.

22 Although the court agrees that plaintiff's motion to proceed in forma pauperis should be
 23 denied, the court declines to dismiss the case at this time. Instead, plaintiff shall be afforded an
 24 opportunity to pay the required filing fee.

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28 ¹ The magistrate judge appears to have used the incorrect case number. (See Doc. No. 10 at 2.) The case name and date of the decision, however, are correct. (See *id.*)

1 Accordingly,

2 1. The findings and recommendations issued on May 15, 2020 (Doc. No. 10) are adopted
3 insofar as they recommend denial of plaintiff's application to proceed in forma
4 pauperis;

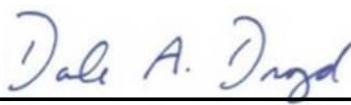
5 2. Plaintiff's motion to proceed *in forma pauperis* (Doc. No. 2) is denied;

6 3. Plaintiff shall submit the \$400 filing fee in full within thirty days from the date of this
7 order before proceeding with this action; and

8 4. Any failure to pay the required filing fee within the time provided will result in the
9 dismissal of this action.

10 IT IS SO ORDERED.

11 Dated: June 3, 2020


12 Dale A. Troyd
13 UNITED STATES DISTRICT JUDGE

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